Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

CURTIS CHEEVES & THEDORE GIBSON, et al.,

Petitioners,

v.

SOUTHERN CLAYS, INC., et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 16, 1995

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QUESTION PRESENTED FOR REVIEW

In cases of a court's apparent bias against **counsel** derived from **extrajudicial** sources, does 28 U.S.C. § 455(a)'s requirement that "any judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned" apply to a party's **counsel** with the same force and effect applicable to counsel's client **without** resort to the bias or prejudice standards of 28 U.S.C. §§ 144 and 455(b)(1) governing **parties**?

RULE 14(b) STATEMENT

The Cheeves petitioners are Lillian Cheeves Bond, Julia Inez Trawick Butts, Mamye Trawick Butts, Curtis Cheeves, Edna Mae Cheeves, Ernestine Cheeves, Frank Cheeves, Hazel Cheeves, Henry Cheeves, III, Lola Cheeves, Sarah Cheeves, Gloria Jean Crumbly, Edgar Crumbly, Jr., Curtis Elliott, Sheila Mills Gilbert, Myrian Trawick Hall, Gloria Louise Trawick Lord, Fleta Hooks Randolph, Marilyn Swinton, Clyde Trawick, Laurty Trawick, Marvin Trawick, Mary Cheeves Trawick and Stephanie Cheeves Tribble.

The Gibson petitioners are Ada Gibson Bond, Alfred G. Gibson, Robert Lee Gibson, Thedore Gibson, Willie James Gibson, Griffin Lewis, Jerry Lewis, Jimmie Lewis, Jr., Jimmie Lewis, Sr., Karen Lewis, Michael Lewis, Myron Lewis, Mary Gibson Robinson, Richard Shinholster and Sara F. Gibson Simmon.

The defendants/respondents in both *Cheeves* and *Gibson* are Southern Clays, Inc. and the Rhode Island Charities Trust.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Opinions Below	1
Jurisdiction	1
Federal Statutes Involved	3
Statement of the Case	3
A. Introduction	3
B. Nature of Petitioners' Civil Cases	5
C. History and Scope of Recusal Motions	6
D. Appeal Before the Eleventh Circuit	7
E. Extrajudicial Objective Circumstances	8
Reasons for Granting the Writ	14
Conclusion	25
Appendix	App. 1

TABLE OF AUTHORITIES

Page

CASES:

Affiliated Ute Citizens v. United States, 406 U.S. 128 (1971) 5

Bell v. Chandler, 569 F.2d 556 (10th Cir. 1978) 17

Berger v. United States, 225 U.S. 22 (1921) 22, 25, 26

Cheeves & Gibson v. Southern Clays, Inc., 113 S.Ct. 832 (1993) 1, 8, 9

Davis v. Board of School Commissioners of Mobile County, 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) 4, 18

Gilbert v. City of Littlerock, 722 F.2d 1390 (8th Cir. 1983), *cert. denied*, 486 U.S. 972 (1984) 10

Haines v. Liggett Group, 975 F.2d 81 (3rd Cir. 1992) 22

Hall v. Wingate, 159 Ga. 630, 126 S.E. 796 (1924) 5

Hume v. United States, 132 U.S. 406 (1989) 5

In re Beard, 811 F.2d 818 (4th Cir. 1987) 18

In re Complaint of Judicial Misconduct, 858 F.2d 331 (6th Cir. 1988) 4

In re Cooper, 821 F.2d 833 (1st Cir. 1987) 17

In re Corrugated Container Antitrust Litigation, 614 F.2d 958 (5th Cir.), *cert. denied, Mead Corporation v. Adams Extract*, 449 U.S. 888 (1980) 1, 2

Kirkland v. National Mortgage Network, Inc., 884 F.2d 1367 (11th Cir. 1989) 1

TABLE OF AUTHORITIES – Continued

Page

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 3, 4, 15, 16

Liteky v. United States, 1994 U.S. LEXIS 2045, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) 3, 4, 7

McLendon v. Georgia Kaolin Co., 782 F.Supp. 1548 (N.D. Ga. 1992) 23, 24

Moore v. McGraw Edison Co., 804 F.2d 1026 (8th Cir. 1986) 19

Phillips v. Joint Legislative Committee, 637 F.2d 1014 (5th Cir. 1981), *cert. denied*, 456 U.S. 960 (1982) 2

Souder v. Owens-Corning Fiberglas Corp., 939 F.2d 647 (8th Cir. 1991) 18, 19, 20, 21

United States v. Burt, 765 F.2d 1364 (9th Cir. 1985) 19

United States v. Gregory, 565 F.2d 1132 (5th Cir. 1981) 2, 18

United States v. Kelly, 888 F.2d 732 (11th Cir. 1989) 2, 21

United States v. Ritter, 540 F.2d 549 (10th Cir.), *cert. denied sub nom Olsen Farms, Inc. v. United States*, 429 U.S. 951 (1976) 17, 19

STATUTES:

18 U.S.C. § 401 14

28 U.S.C. § 144 ..... *passim*

28 U.S.C. § 292(b) 10, 12, 13, 14, 23

28 U.S.C. § 372(c) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 372(c)(3) 8

28 U.S.C. § 455 ..... 15, 16, 17, 18, 19, 21

28 U.S.C. § 455(a) ..... *passim*

28 U.S.C. § 455(b)(1) 3, 4, 15, 18, 19, 25

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2106 ..... 2, 14, 21, 26

O.C.G.A. § 23-2-53 24

OTHER AUTHORITIES:

F.R.Civ.P. 11 ..... 11, 12, 13, 14, 22, 23

F.R.Civ.P. 60(b)(6) 4

American Bar Association, 1990 Model Code of Judicial Conduct, Canon 3E(1) 15, 19

Story, J., *Equity Jurisprudence*, Chap. VI, Actual Fraud § 188 at 201-02 (13th ed. 1988) 5

15A Wright & Miller, Federal Practice and Procedure § 3905.1 (1992) 1

H.R. Rep. No. 93-1453, 93d Cong., 2d Sess. 1, reprinted in [1974] U.S. Code Cong. & Ad. News at 6355 17

OPINIONS BELOW

This Petition for Certiorari arises from the judgment of the Eleventh Circuit Court of Appeals dated October 24, 1994 (App. 19-20) affirming *per curiam* the summary judgment entered against Petitioners/Plaintiffs by the United States District Court for the Middle District of Georgia. (App. 7-18). The Eleventh Circuit denied Petitioners' timely-filed Petition for Panel Rehearing in its *per curiam* order of December 16, 1994. (App. 21-22).

JURISDICTION

This Court has jurisdiction to review the final judgments of the Court of Appeals by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1). This Court also has jurisdiction to review previously non-appealable interlocutory orders denying motions to disqualify the district court judge. (*E.g.*, App. 4-6) *In re Corrugated Container Antitrust Litigation*, 614 F.2d 958 (5th Cir. 1980), *cert. denied, Mead Corporation v. Adams Extract*, 449 U.S. 888 (1980). These prior orders are now fully reviewable on appeal from the final judgments. *E.g., Kirkland v. National Mortgage Network, Inc.*, 884 F.2d 1367 (11th Cir. 1989); 15A Wright & Miller, Federal Practice and Procedure § 3905.1 at 250 (1992).

This Court's previous denial of Petitions for Writs of Certiorari and Mandamus/Prohibition, *Cheeves & Gibson v. Southern Clays, Inc.*, 113 S.Ct. 832 (1993) respecting the Eleventh Circuit's previous denial of Petitioners' Petition for Mandamus/Prohibition (App. 1) does not foreclose

review of prior orders denying disqualification. *E.g., Phillips v. Joint Legislative Committee*, 637 F.2d 1014 (5th Cir. 1981), *cert. denied*, 456 U.S. 960 (1982). When considering Petitioners' prior Petitions for Writ of Mandamus/Prohibition, the Eleventh Circuit and this Court were empowered to grant such extraordinary relief only if the district court was "clearly and indisputably" in error. *E.g., United States v. Gregory*, 565 F.2d 1132, 1136 (5th Cir. 1981); *In re Corrugated Container Antitrust Litigation*, 614 F.2d 958, 962 (5th Cir.), *cert. denied*, 449 U.S. 888 (1980). In the context of this direct appeal, this Court may now reverse the Eleventh Circuit's final judgment denying disqualification and order vacatur and reassignment upon a finding that the district court abused its discretion under the Eleventh Circuit's "clear error of judgment" standard. *United States v. Kelly*, 888 F.2d 732, 745 (11th Cir. 1989).

Of course, wholly apart from answering the disqualification issue vis-a-vis **counsel** presented for review, this Court has jurisdiction to vacate the judgments below and order reassignment and reconsideration of Petitioners' cases pursuant to the Court's supervisory powers under 28 U.S.C. § 2106.[1]

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[1] **§ 2106. Determination**. The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

FEDERAL STATUTES INVOLVED

Title 28 U.S.C. § 455(a) provides:

Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Title 28 U.S.C. § 455(b)(1) provides:

He shall also disqualify himself in the following circumstances:

> Where he has a personal bias or prejudice concerning **a party** . . . .

Title 28 U.S.C. § 144 provides:

Whenever a **party** to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse **party** . . . .

STATEMENT OF THE CASE

A. Introduction.

In contrast to the Court's *Liljeberg* and *Liteky* decisions[2] under 28 U.S.C. § 455(a), this Petition poses the issue of whether disqualification for **extrajudicially** acquired appearances of partiality for or against **counsel**

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[2] *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) and *Liteky v. United States*, 1994 U.S. LEXIS 2045, 114 S.Ct. 1147, 127 L. Ed.2d 474 (1994).

shall be governed by the general "impartiality might reasonably be questioned" standard of Section 455(a), by the bias or prejudice standards of 28 U.S.C. §§ 144 and 455(b)(1) expressly applicable only to **parties**, or by the sundry other standards such as the so-called "pervasive bias exception"[3] inconsistently applied by the Courts of Appeals.

Unlike *Liljeberg*, the district court below had **actual**, not merely "constructive", knowledge of extrajudicial circumstances raising disqualifying appearances. Unlike *Liljeberg*, the vacatur and reassignment sought by Petitioners comes before this Court in the context of a **final judgment appeal** rather than a Rule 60(b)(6) vacatur sought long after the *Liljeberg* judgment had been affirmed on appeal.

Unlike *Liteky*, the disqualifying appearances involved below concerned not Petitioners themselves but rather Petitioners' **counsel**. Such appearances ensued not from judicial rulings in Petitioners' cases but rather from extrajudicial 28 U.S.C. § 372(c) judicial misconduct charges and subsequent administrative proceedings[4] initiated against the district court by Petitioners' **counsel**.

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[3] E.g. *Davis v. Board of School Commissioners of Mobile County*, 517 F.2d 1044, 1051 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) cited in *Liteky*, *supra*, at 127 L. Ed.2d 488.

[4] In contrast to judicial proceedings, "[t]he complaint procedures of [section 372] provide administrative remedies only in the absence of appropriate judicial remedies." *In re Complaint of Judicial Misconduct*, 858 F.2d 331-32 (6th Cir. 1988).

B. Nature of Petitioners' Civil Cases.

Petitioners consist of 38 black citizens who are the heirs at law of forbears who sold their middle-Georgia lands to the Defendants/Respondents Southern Clays, Inc. and its sole shareholder, The Rhode Island Charities Trust. Petitioners' diversity cases were filed separately in early 1986 and later consolidated.

In similar fashion to the Ute Indians who were defrauded in the ***sale*** of their interests in underground oil, gas, and oilshale, *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1971), Petitioners complaints alleged counts in common law fraud, unconscionability[5] and equitable recision. Petitioners alleged that their ancestors were defrauded when Respondents purchased for only **$175,000** some 15 million tons of underground mineral reserves worth not less than **$4,900,000** according to the testimony of Southern Clays' own president. Indeed, it is undisputed in the record that Respondents purchased the

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[5] The Supreme Court of Georgia and this Court have both defined actual fraud in the form of unconscionability as follows:

> An unconscionable contract is one abhorrent to good morals and conscience. It is one where one of the parties takes a fraudulent advantage of another. An unconscionable contract is one such as no man in his senses and not acting under a delusion would make on the one hand, and as no honest or fair man would accept on the other.

Hall v. Wingate, 159 Ga. 630, 667, 126 S.E. 796 (1924); *Hume v. United States*, 132 U.S. 406, 411 (1989). The district court held Petitioners' unconscionability counts to constitute mere "constructive fraud" notwithstanding **universal** authority to the contrary. *See* Story, J., *Equity Jurisprudence*, Chap. VI, Actual Fraud § 188 at 201-02 (13th ed. 1988).

Gibson family's farm for **$40,000** in 1962 and one year later sold the **same farm** to another mineral company which insured its title to the Gibson farm for **$1,440,000!**

C. History and Scope of Recusal Motions.

During the pendency of Petitioners' cases and prior to the entry of summary judgment, the district court denied a total of five disqualifications motions, the last such order being reproduced at pages 4-6 of the Appendix. Each successive motion was predicated on the discovery of additional facts or new events raising appearances of impropriety. Counsel's dilemma was that failing to raise such new matters promptly upon their discovery would have waived such matters as a matter of law as a future basis for later disqualification through mandamus petitions or any final judgment appeal.

Petitioners' last two disqualification motions focused exclusively upon the appearances of bias and prejudice against Petitioners' ***legal counsel*** as the result of counsel's filing of a 28 U.S.C. § 372(c) judicial misconduct complaint on July 20, 1990, and ensuing events during a special committee's 20-month investigation of the district court. None of the events asserted in the fourth and fifth recusal motions, which exclusively concerned disqualifying appearances vis-a-vis Petitioners's ***legal counsel***, had **even occurred** as of the date of the district court's denial of Petitioners' third disqualification motion.

Suffice it to note here that the district court granted summary judgment against Petitioners upon the ground that their fraud claims, including even their purportedly "constructive fraud" unconscionability counts, were not

equitably tolled such that Petitioners' claims were barred by the applicable Georgia statute of limitations (App. 7-18).

D. Appeal Before the Eleventh Circuit.

Petitioners' appeal before the Eleventh Circuit challenged the district court's summary judgment upon two fundamental grounds: (1) that genuine material issues of fact regarding equitable tolling and Petitioners' underlying fraud claims barred summary judgment; and (2) that the district court's summary judgments were subject to vacatur by reason of the district court's erroneous denial of Petitioners' last two disqualification motions exclusively concerning appearances of **extrajudicially** acquired animus by the district court towards Petitioners' **counsel**.

The district court's order, and presumably the Eleventh Circuit through its affirmance, premised the denial of Petitioners' last recusal motion upon three grounds: (1) that "the alleged bias or prejudice must stem from an extrajudicial source" (App. 5) – a principle since confirmed by *Liteky*; (2) that "the alleged bias or prejudice must be against the party, not the attorney or the attorney-in-fact for the party" (App. 6); and (3) that the court's bias against Petitioners' counsel must be "so virulent that the judge's impartiality toward that attorney's client may reasonably be questioned." The last two grounds constitute core issues never previously decided by this Court under § 455(a).

E. Extrajudicial Objective Circumstances

The following facts relevant to antagonism on the part of the district court toward Petitioners' counsel, Franklin R. Nix, are as follows:

- Mr. Nix filed a judicial misconduct complaint against the district court on July 20, 1990, expressly complaining of the conduct of the district court in Petitioners' cases and others. (Eleventh Circuit, Misc. Docket No. 90-2132, Complaint).

- Page 3 of the 372(c) complaint, which was filed under oath, shows that "[i]n seventeen years of extensive litigation practice in the state and federal courts of Georgia, the undersigned, until encountering the judicial misconduct [of the district court in *Cheeves & Gibson*], had never encountered any violation of the Code of Judicial Conduct nor had occasion to seek the disqualification of any judge for any reason." *Id.*

- The specifics of the conduct complained of were provided by attaching to the Complaint 53 pages of excerpts from Petitioners' first three recusal motions filed November 19, 1989, and January 25 and May 16, 1990. (Eleventh Circuit, Misc. Docket No. 90-2132, Complaint).

- Chief Judge Tjoflat, in the exercise of his screening authority to either dismiss a complaint or appoint a special committee under 28 U.S.C. § 372(c)(3), appointed a special committee before receiving the written response of the district court. (Misc. Docket No. 90-2132, Order Appointing Special Committee; Answer to Complaint).

- During the special committee hearings Chief Judge Tjoflat stated that he convened a special committee

because "[Mr. Nix] filed a complaint which on its face disclosed all sorts of criminal activities." (Misc. Docket No. 90-2132, Transcript Vol. III, January 9, 1992, at 243).

• The special committee retained as private investigative counsel, Alan Sundberg, Esq., a former justice of the Supreme Court of Florida. Based upon an exhaustive investigation, Mr. Sundberg issued a 44-page Investigative Report containing, *inter alia*, the following conclusion:

> "The § 372 complaint raises ***serious claims*** of misconduct by Judges Fitzpatrick and Owens involving a trio of kaolin cases [including *Cheeves* and *Gibson*] . . .
>
> * * *
>
> We have investigated each of Nix's misconduct claims. In the main, your investigators conclude that the allegations of misconduct are the product of inference and speculation which are based upon very slender reeds of ***actual fact***. While the interpretation and liberal extrapolation by Nix of the ***limited facts to which he had access*** may have *understandably* raised misconduct concerns, investigation of the factual allegations of the complaint refute beyond any doubt the misconduct charges alleged in the complaint. Although we find no evidence to support the § 372 complaint, ***we hasten to add that we do not believe the complaint was filed by Nix in bad faith or with an improper motive.***"

(Misc. Docket No. 90-2132, Investigative Report, Defendants' Ex. IC-A at 6-7) (emphasis added).

• During the special committee's hearings upon the § 372(c) complaint, Petitioners' counsel was subpoenaed

to testify in support of the complaint's charges and did so testify in the presence of the district court.

• During the pendency of the special committee proceedings Chief Judge Tjoflat, pursuant to 28 U.S.C. § 292(b) found it necessary in the "public interest" to designate another district court judge to sit in Petitioners' cases on the matters identified in his order of December 30, 1991. (App. 2).

• The district court asserted in its order of June 5, 1992, its **subjective** belief that it "harbors no bias or prejudice against Mr. Nix or his clients." (App. 6).

• Outside the presence of Mr. Nix, however, the district court had previously testified under oath before the special committee as follows:

> [JUDGE OWENS]: Well, Mr. Nix, as you may have observed, is a person who when given one answer then asks you ten more questions. He talks forever. ***I frankly just can only deal with him if I say as little as necessary. And that's the posture I have. He reminds me a lot of some of the prisoners we have to deal repeatedly (sic) on*** 2255.
>
> I have to still preside over these matters, you know, in spite of his attitude towards me. And I'm not going to let his attitude toward me affect the cause of his clients. But he's still going to give his clients their day in courts (sic).
>
> JUDGE HOBBS: If it were a litigant ***other than Mr. Nix***, let's say an attorney ***other than Mr. Nix***, and he said, Judge, I understand you had a communication with Judge Fitzpatrick about this, and I know how strongly Judge Fitzpatrick

> feels about Mr. Watkins, I want to know could that conversation have affected you in any way in terms of your presiding over this thing, and would you tell me what that conversation was?
>
> [JUDGE OWENS]: Well, Judge, to be honest with you, I guess I would have to wait until that happened. **I can't answer that hypothetical.**
>
> JUDGE HOBBS: I just wondered if maybe we wouldn't all of us be somewhere else today. I don't know. (Eleventh Circuit Misc. Docket No. 90-2132, Transcript Vol. II of October 10, 1991, at 342-43) (emphasis added).

• Upon learning on June 5, 1990, that the Judicial Council was dismissing the § 372(c) charges, the district court immediately issued its order of June 5, 1992, (App. 4-6) denying Petitioners' last recusal motion and directing Petitioners' legal counsel to "show cause" why he should not be sanctioned under Rule 11 for "harassment" of the court. (App. 6).

• In response to the district court's "show cause" order on June 8, 1992, Professor L. Ray Patterson, Esq., of the University of Georgia School of Law, acting as independent legal counsel for Mr. Nix, filed a ***sixth*** motion to recuse the district court asserting identical grounds previously relied upon by Mr. Nix and incorporating by reference ***every*** prior disqualification motion previously filed in Petitioners' cases.

• The district court did not subsequently characterize the ***sixth*** disqualification motion filed by Professor Patterson as "harassment," nor did it issue an order requiring Professor Patterson to show cause why he

should not be sanctioned under Rule 11. Professor Patterson had had no involvement in the § 372(c) proceedings concerning the district court.

- Professor Patterson sought and was granted an extension through July 15, 1992, to file his written response to the district court's show cause order of June 5, 1992. (App. 4-6).

- On June 8, 1992, § 372(c) charges against the district court were formally dismissed and the district court, having been cleared of any misconduct, faced no legal impediment to resolving its own Rule 11 show cause order against Petitioners' counsel.

- During the forty-day period from issuance of the district court's Rule 11 show cause order of June 5th and the filing of Petitioners' counsel's response of July 15th, no order issued pursuant to 28 U.S.C. 292(b) appointing another judge to preside over the district court's Rule 11 hearing against Petitioners' counsel.

- Chief Judge Tjoflat did not find the "public interest" to require another § 292(b) appointment of Judge Hodges until twelve days **after** the filing of the following response to the district court's Rule 11 order.

> "This Response will demonstrate that the fifth recusal motion filed in the above-styled causes, which was not even addressed to The Honorable Wilbur D. Owens, Jr., but rather to The Honorable William Terrell Hodges, was well grounded in fact, warranted by existing law and not interposed for any improper purpose. Indeed, in order for this Court to find Plaintiffs' counsel guilty of "harassment", the Court would have to make the same finding with respect to L. Ray

> Patterson, Esq., perhaps Georgia's foremost expert in legal and judicial ethics, who filed on June 8, 1992, a motion to recuse the Court founded upon the same grounds relied upon by Plaintiffs' counsel and founded upon all seven prior recusal motions in *U.S. v. Watkins* and *Cheeves & Gibson*. Given the identical nature of the recusal motions filed by Plaintiffs' counsel and Mr. Patterson, why has the Court not termed Mr. Patterson's recusal motion as "harassment" and required Mr. Patterson to show cause why he should not be sanctioned under Rule 11? There is nothing in the record to account for such disparate treatment of counsel ***other than*** judicial misconduct and criminal charges filed by Mr. Nix but not Mr. Patterson, such that the sanctions which the Court apparently intends to impose under Rule 11 constitute purely and simply a reprisal against Mr. Nix for his exercise of rights under laws of the United States and his adherence to obligations imposed by the Code of Professional Responsibility adopted by the State Bar of Georgia."

(Response of Petitioners' Counsel filed July 15, 1992) (emphasis in original).

• Not until **twelve days** ***after*** the filing of the above-quoted response did Chief Judge Tjoflat, find pursuant to 28 U.S.C. § 292(b), that the public interest again required his appointment of District Judge William Terrell Hodges to preside over the district court's Rule 11 show cause proceedings.

• After conducting a hearing upon the district court's Rule 11 show cause order, Judge Hodges issued his unpublished order of October 30, 1992. Finding it a

case of first impression, Judge Hodges concluded: (1) that a district court has the subject matter jurisdiction to invoke Rule 11 *sua sponte* to punish harassment of the court notwithstanding the criminal contempt remedy afforded by 18 U.S.C. § 401; (2) that Rule 11 had been violated; and (3) that a "symbolic fine" of $500.00 was appropriate.

- No subsequent order ever issued thereafter requiring Professor Patterson to show cause under Rule 11 why he should be sanctioned for harassment of the district court through the filing of his ***sixth*** motion for disqualification.

- Professor Patterson's subsequent Petition for Writs of Mandamus/Prohibition filed in the Eleventh Circuit seeking the disqualification of the district court in Petitioners' cases was denied *per curiam* on June 26, 1992. (App. 1).

- At no time between Chief Judge Tjoflat's last § 292(b) appointment of Judge Hodges to sit in place of the district court and the district court's entry of summary judgment did Chief Judge Tjoflat, pursuant to § 292(b), nor the Eleventh Circuit, pursuant to 28 U.S.C. § 2106, designate or reassign another district judge to preside over Petitioners' cases.

REASONS FOR GRANTING THE WRIT

Aside from the extrajudicial source requirement satisfied by the above-stated circumstances concerning counsel's § 372(c) charges against the district court, the district

court denied disqualification under two additional grounds: (1) that "the alleged bias or prejudice must be against the party, not the attorney or the attorney-in-fact for the party" (App. 6); and (2) that the court's bias against Petitioners' counsel must be "so virulent that the judge's impartiality toward that attorney's client may reasonably be questioned." *Id.* The district court, and presumably the Eleventh Circuit by its affirmance, denied disqualification under the standards of not only 28 U.S.C. § 455(a) but also under Canon 3E(1)(a) of the American Bar Association's 1990 Model Code of Judicial Conduct. (App. 5).

Canon 3E(1):

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, included but not limited to instances where . . .
>
> (1) a jury has a personal bias or prejudice concerning a party or a party's **lawyer.**

This addition of bias against a party's **lawyer** as a basis of disqualification has not yet been added by Congress to § 455(b)(1) nor has the existing Code of Judicial Conduct for United States Judges adopted this 1990 Model Code provision. The change, however, reflects an important trend in professional and ethical thought. Moreover, the purpose of § 455 – to promote public confidence in the integrity and impartiality of the judicial process and the federal judiciary (*Liljeberg at 860*) – requires recognition that the disinterested, objective lay person would likely find any attempted distinction between bias and prejudice against a party versus that against a party's **counsel** to be a distinction without a

difference. Indeed, a disinterested lay observer might well find it puzzling to know that a federal judge under *Liljeberg* may be disqualified after the fact on the basis of his "constructive" knowledge of matters actually unknown to him, but is immune to disqualification if it is sought on the basis of the court's bias or prejudice against a party's **counsel,** rather than counsel's client. It requires no imagination to presume that a court's bias or prejudice against **counsel** may work harm to his client's case.

There are stark differences among the Courts of Appeal in grappling, in the absence any guidance by this Court since the 1974 amendment of § 455, with how disqualification shall be handled in the case of bias or prejudice against a party's counsel. At one end of the spectrum, is the Eleventh Circuit's holding in the case at bar, by affirmance of the district court's order (App. 4-6), that even extrajudicially source of bias or prejudice must be against the party, or the bias or prejudice against the party's counsel must be so "virulent" (App. 6) that the judge's impartiality toward the attorney's **client** may reasonably be questioned.

This imputation of bias and prejudice against **counsel** to counsel's client is not unreasonable in light of counsel's omission from § 455(b)(1). Such imputation, however, circumvents and ignores completely the general "impartiality might reasonably be questioned" standard of § 455(a), which identifies no class of protected persons at all. Indeed, the legislative history of § 455(a) demonstrates that Congress felt the change was essential to "promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he

should disqualify himself and let another judge preside over the case." *H.R. Rep. No. 93-1453, 93d Cong., 2d Sess. 1, reprinted in [1974] U.S. Code Cong. & Ad. News at 6355.*

At the other end of the spectrum are holdings of the Tenth Circuit, which has rejected the notion that § 455 does **not** require disqualification where bias in favor of or against an attorney, as opposed to a party, is alleged. "We do not believe, however, that this is strictly true, for bias in favor of or against an attorney can certainly result in bias toward the party. Thus, if a judge is biased in favor of an attorney, his impartiality might reasonably be questioned in relationship to the party." *United States v. Ritter,* 540 F.2d 549, 462 (10th Cir.), *cert. denied sub nom Olsen Farms, Inc. v. United States,* 429 U.S. 951 (1976).

Closer to the general "impartiality might reasonably be questioned" test of § 455(a) is the Tenth Circuit decision of *Bell v. Chandler,* 569 F.2d 556 (10th Cir. 1978) (animus of district court towards government counsel found disqualifying). "Subsection (a) [of Section 455] questions whether there exists a reasonable likelihood that the cause will be tried with the impartiality that litigants have a right to expect in a United States District Court." *Id.* at 560.

Other circuits fall somewhere in between the extremes stated above. *In re Cooper,* 821 F.2d 833, 838-39 (1st Cir. 1987) (generally, clashes between court and counsel are insufficient basis for disqualification under either [28 U.S.C. §§ 144 or 455]). *Cooper* nevertheless observes that "occasionally **exceptional circumstances** do arise where a judge's attitude toward a particular attorney is so hostile that the judge's impartiality toward the client

may be reasonably questioned. Such an imputation of bias against counsel to the client is necessary under § 455(b)(1) but wholly unnecessary and unreasonable under § 455(a).

The Fourth Circuit has held that "bias against an attorney is not enough to require disqualification under § 455 unless petitioners can show that such a controversy would demonstrate a bias against the party itself." *In re Beard*, 811 F.2d 818, 830 (4th Cir. 1987) (citing *Davis v. Board of School Commissioners*, 517 F.2d at 1050-52 (5th Cir. 1975)). In relying upon *Davis*, the Fourth Circuit in *Beard* observed that "for the bias against the attorney to require disqualification of the trial judge, it must be of a continuing and personal nature and not simply bias against the attorney because of his conduct." *Beard* at 830.

Construing §§ 144 and 455 in *pari materia*, the Fifth Circuit has recognized a "pervasive bias" exception. *Davis v. Board of School Commissioners of Mobile County*, 517 F.2d 1044, 1051 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (exception to disqualification under § 144 exists "where such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party."). *Accord, United States v. Gregory*, 657 F.2d 1132, 1136-37 (5th Cir. 1981).

The Eighth Circuit, after observing that each alleged act of bias was directed at a party's **counsel** and that there was no claim of bias toward the party herself, held that "antipathy to an attorney is insufficient grounds for disqualification of a judge because it is not indicative of extrajudicial bias against a party." *Souder v. Owens-Corning Fiberglas Corp*, 939 F.2d 647 (8th Cir. 1991) (citing

Gilbert v. City of Littlerock, 722 F.2d 1390, 1398 (8th Cir. 1983), *cert. denied*, 486 U.S. 972 (1984)). As to § 455, the Eighth Circuit in *Souder* further held that "a showing of bias against a party as opposed to counsel is also required under section 455 'in absence of [a] showing of bias or personal prejudice to the parties.' " *Souder* at 1399. *Accord, Moore v. McGraw Edison Co.*, 804 F.2d 1026, 1032 (8th Cir. 1986).

Equally restrictive is the test of the Ninth Circuit. "Personal bias or a prejudiced attitude must be against the party, not against the attorney for the party." *United States v. Burt*, 765 F.2d 1364, 1368 (9th Cir. 1985). Reflective of the Ninth Circuit's recognition of its conflict with other circuits is its further comment that "**other courts have suggested** that 'bias for or against an attorney can certainly result in bias toward the party.' " *Burt* at 1368 (emphasis added) (citing *United States v. Ritter, supra*).

Notwithstanding the aspirational goal of 1990 Model Code Canon 3E(1), there remains a wide disparity of standards and burdens of proof among the various Courts of Appeal as to counsel-based disqualifications. Such disparities and conflicts are not surprising in the light in the lack of any Supreme Court guidance since the promulgation of new § 455 in 1974. Instead of the reasonableness test of § 455(a), the appellate decisions cited above, in light of the express absence of counsel from the bias or prejudice tests of §§ 144 and 455(b)(1), have engrafted all manner of limitations upon the general reasonableness standard of § 455(a). Promoting public confidence in the integrity and impartiality of the judiciary is actually disserved by such restrictions.

Instead of answering the simple question of whether a disinterested objective lay person "might reasonably question" the impartiality of the judge for **any reason**, including bias against counsel, counsel-based disqualification decisions have demanded the finding of "exceptional circumstances," "pervasive bias," or "personal and continuing bias." Additionally, the disinterested objective lay person's reasonableness standard is further subjected to the question of whether the bias or prejudice against counsel, no matter how "exceptional," "virulent," "pervasive," or otherwise, can be inferred to constitute bias or prejudice against counsel's client. This plunges the process directly back into subjective speculation about whether the court would allow animus against counsel to harm counsel's client – a subjective standard abolished by § 455(a).

The lack of a consistent standard was noted by the Eighth Circuit in its 1991 *Souder* decision.

> "In *Davis*, the courting acknowledged the possibility of imputed bias if the attorney and party shared a characteristic, such as a race or ethic background, and the bias for or against the attorney was due to that shared characteristic. 517 F.2d at 1050-51. The court in *Beard* required additional proof that the alleged bias against the attorney actually caused bias to the party. 811 F.2d at 830. Finally, although the court in *Ritter* stated that bias for or against an attorney could prejudice the party, **it did not set out a standard** for determining when a finding of imputed bias would be appropriate. *See*, 540 F.2d at 452. Thus the cases generally support a theory of imputed bias only where there are alleged additional

> facts that suggest that bias against the attorney actually extends to the party."

Souder, supra, at 653, n.6 (emphasis added).

Such a struggle with imputing bias or prejudice against counsel to counsel's client represents a total abandonment of the objective reasonable standard of § 455(a), which is not limited on its face. Congress clearly did not intend to restrict or condition § 455(a) disqualification to any particular form of conduct toward or by any particular class of persons, be they parties, counsel, witnesses or otherwise. Indeed, the Eleventh Circuit's 1989 decision in *United States v. Kelly,* 888 F.2d 732, 745 (11th Cir. 1989), reflects the breadth with which the reasonableness test of § 455(a) should be applied. In *Kelly,* the Eleventh Circuit found that the district judge presiding in a criminal trial committed a "clear error of judgment" in failing to recuse himself based upon his admitted "***discomfort***" in presiding over a criminal trial in which the judge's **wife** was a close personal friend of a woman whose **husband** was called to testify as a **defense** witness. Surely the antagonism and animus of the district court in the case at bar toward Mr. Nix substantially succeeds the mere "discomfort" level held by the Eleventh Circuit in *Kelly* to satisfy the "clear error of judgment" standard for disqualification under § 455(a). Not surprisingly, Respondents never attempted to prove below that the district court is **not** biased and prejudiced against Petitioners' counsel.

Given the ability of appellate courts to reassign cases to other judges pursuant to the supervisory powers conferred by § 2106 without resorting to §§ 144 or 455, it should be noted that the Third Circuit's decision in

Haines v. Liggett Group, 975 F.2d 81 (3rd Cir. 1992) is philosophically at odds with most of the Court of Appeals' decisions reviewed above. *Haines, supra*, took pains to point out that the test for supervisory removal is the appearance of impartiality. The test "is not our subjective impressions of [the district judge's] impartiality gleaned after reviewing his decisions these many years; rather, the polestar is 'impartiality and the appearance of impartiality.' " *Haines, supra*, at 898. This is exactly the same test for recusal under § 455(a). In Petitioners' case there exist at least the following five general grounds, both extrajudicial as well as intrajudicial, reflecting the kind of virulent and pervasive prejudice against counsel which prevented Petitioners' from receiving a fair hearing upon Respondents' summary judgment motions.

First, the district court displayed actual hostility toward Petitioners' counsel engendered by the district court being subjected to § 372(c) charges. The district court's opinions about Petitioners' counsel readily equate to the disqualifying opinions stated by the district court in *Berger v. United States*, 255 U.S. 22, 28 (1921) (quoted in *Liteky* at 127 L.Ed. 490).

Second, the district court's above-quoted sworn testimony before the Eleventh Circuit special committee amazingly reflects the district court's **inability** to assure his examiner that Petitioners' cases would not fair better before him with counsel ***other than Mr. Nix.***

A third factor is the appearance of immediate retaliation and reprisal against Mr. Nix through the district court's Rule 11 show cause order, as contrasted with the district court's disparate treatment of Professor Patterson.

Professor Patterson had fully reviewed all prior recusal motions and was aware of the likelihood of incurring he same Rule 11 retaliation already visited upon Mr. Nix. But Professor Patterson nevertheless found himself ethically and professionally obliged to, in effect, "tell the emperor that he wears no clothes" through the filing of a ***sixth*** recusal motion. What accounts for the district court's failure to sanction Professor Patterson's deliberate conduct duplicating **all** of Mr. Nix's prior disqualification efforts **other than** his noninvolvement in the prior § 372(c) proceedings?

Fourth, the chief judge of the Eleventh Circuit, notwithstanding the dismissal of the § 372(c) charges and the exoneration of the district court in the proceedings, nevertheless found it necessary "in the public interest," pursuant to § 292(b), to ameliorate the obvious appearances of Rule 11 retaliation and reprisal against Mr. Nix by designating another district judge to hear the matter. Would not the disinterested objective lay person reasonably apprehend that the district court might just redouble its retaliation and reprisal when presented with the opportunity to administer the *coup de grace* to Petitioners' **and their counsel** through the granting of Respondents' summary judgment motions?

Finally, the disinterested objective lay person would wonder how it is that the district court could turn its back upon its own prior holding in which the district court ***denied summary judgment*** respecting another black family's sale of their mineral lands for a small fraction of their fair value – precedent absolutely indistinguishable in terms of the facts and substantive law in Petitioners' cases. *McLendon v. Georgia Kaolin Co.*, 782 F.Supp. 1548

(N.D. Ga. 1992). In *McLendon,* the same district court presiding over Petitioners' cases ***denied*** summary judgment as to 11 out of 12 mineral land owners' claims under the same fraudulent concealment statute relied upon by Petitioners, O.C.G.A. § 23-2-53. In granting summary judgment against Petitioners (App. 7-18) the district court could not explain why Petitioners' indistinguishable cases were not controlled by the following *McLendon* holding:

> Whether purchaser of farmland had ***duty to disclose*** that property contained **large deposits of kaolin** clay was a fact question which ***precluded*** **summary judgment** in ***fraudulent concealment claim*** [under § 23-2-53] by vendors in light of evidence that purchaser drilled on property ***prior to conveyances,*** purchaser ***did not reveal results of drilling survey,*** actual market value of property was ***greater than purchase price,*** discovery of kaolin required scientific expertise, ***which vendors did not have,*** an agent for vendors was also undisclosed agent for purchaser.

McLendon, Headnote 12 at 1549 (emphasis added).

The ***sole factor*** which Petitioners' cases lacked in comparison to *McLendon* was the noncontrolling issue of an undisclosed agent. Upon vacatur, remand, and reassignment to a district judge, the above-quoted *McLendon* holding, applied to the existing evidence in Petitioners' cases, would compel any impartial district judge to follow *McLendon* in **denying** Respondents' summary judgment motions.

CONCLUSION

Petitioners base this Petition on the above-disclosed fact of wide disparity among the Courts of Appeal in the handling of disqualification based upon extrajudicially acquired bias or prejudice against a party's **counsel.** Attempts to fit such circumstances to the language of §§ 144 and 455(b)(1) through imputation of special circumstances of bias and prejudice against counsel to counsel's client has only led to confusion ad conflict among the Courts of Appeals. More importantly, such efforts have operated to deprive litigants to resort to the § 455(a) impartiality standard which should be applied to all cases reflecting an extrajudicially acquired animus by the court against counsel. Guidance of this Court is required to address the plight of all litigants whose cases stand to be compromised as the result of bias or prejudice against their counsel. Petitioners' prior efforts, through disqualification motions and mandamus petitions before the Eleventh Circuit and this Court, have not prevented Petitioners' from finding themselves in the dilemma eloquently described by this Court in *Berger v. United States.*

> The remedy by appeal [from nonrecusal] is inadequate. It comes after the trial [or summary judgment] and, if prejudice exist, it has worked its evil, and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more illusive of estimate or decision than a disposition of mind in which there is a personal ingredient.

Berger v. United States, 225 U.S. 22, 36 (1921).

Perhaps even more important is this Court's following observation in *Berger* that in disqualifying a court

> there is no serious detriment to the administration of justice nor inconvenience worthy of mention for of what concern is it to a judge to preside on a particular case; of what concern to other parties to have him so preside?

Id. at 35.

An easy way out for the Court, and Petitioners as well, lies in utilizing § 2106 to vacate, remand, and reassign Petitioners' cases to a different district judge. But serving the interest of truly preserving the integrity and impartiality of the federal judiciary, however, required that the guidance of the Court in this case of first impression before the Court. Such guidance will undoubtedly spare other litigants before the federal courts from the years of delay, expense, and waste of judicial resources which Petitioners have incurred in honestly attempting to remedy a district court's circumvention of the disqualification statutes.

Respectfully submitted,

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Petitioners' Counsel of Record

IN THE UNITED STATES COURT
OF APPEALS FOR THE
ELEVENTH CIRCUIT

No. 92-8554

IN RE: ROBERT WATKINS,
THEODORE GIBSON,
CURTIS CHEEVES, ET AL.,

Petitioners.

On Petition for Writ of Mandamus/Prohibition
(Filed Jun. 26, 1992)

BEFORE: FAY, BIRCH and DUBINA, Circuit Judges.

The petition for writ of mandamus/prohibition filed in this matter is DENIED.

DESIGNATION OF DISTRICT JUDGE FOR SERVICE IN ANOTHER DISTRICT WITHIN HIS CIRCUIT
(Filed Dec. 30, 1991)

WHEREAS, in my judgment the public interest so requires; Now, therefore, pursuant to the provisions of Title 28, United States Code, Section 292(b), I do hereby designate and assign

THE HONORABLE WILLIAM TERRELL HODGES

United States District Judge for the Middle District of Florida to hold a district court in the Middle District of Georgia for an indefinite period of time beginning December 27, 1991, to handle the motions to quash the subpoenas directed to Chief Judge Wilbur D. Owens, Jr., Judge J. Robert Elliott, and Judge Duross Fitzpatrick, and any matter relating to any party's attempt to take the depositions of those judges, in *Curtis Cheeves, et al., Theodore Gibson, et al. v. Southern Clays, Inc. and The Rhode Island Charities Trust, by and through its Trustees,* Consolidated Civil Action File No. 86-43-1-MAC(WDO), and *United States of America v. Robert L. Watkins,* Criminal No. 89-46-MAC(WDO), until completion of the matter and thereafter as may be required to complete unfinished business.

/s/ Gerald Bard Tjoflat
Chief Judge
United States Court of Appeals
for the Eleventh Circuit

Dated: December 27, 1991

DESIGNATION OF DISTRICT JUDGE FOR SERVICE IN ANOTHER DISTRICT WITHIN HIS CIRCUIT
(Filed July 27, 1992)

WHEREAS, in my judgment the public interest so requires; Now, therefore, pursuant to the provisions of Title 28, United States Code, Section 292(b), I do hereby designate and assign

THE HONORABLE WILLIAM TERRELL HODGES

United States District Judge for the Middle District of Florida to hold a district court in the Middle District of Georgia for an indefinite period of time beginning July 23, 1992, to handle a hearing in which Franklin R. Nix has been ordered by Chief Judge Wilbur D. Owens, Jr. to show cause why he should not be sanctioned pursuant to Rule 11 of the Federal Rules of Civil Procedure in *Curtis Cheeves, et al., Theodore Gibson, et al. v. Southern Clays, Inc. and The Rhode Island Charities Trust, by and through its Trustees,* Consolidated Civil Action File No. 86-43-1-MAC(WDO), and *United States of America v. Robert L. Watkins,* Criminal No. 89-46-MAC(WDO).

/s/ Gerald Bard Tjoflat
Chief Judge
United States Court of Appeals
for the Eleventh Circuit

Dated: July 23, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

CURTIS CHEEVES, et al.:		
Plaintiffs,	:	
vs.	:	C.A. No. 86-43-1-MAC(WDO)
SOUTHERN CLAYS, INC., et al.,	:	86-44-2-MAC(WDO)
Defendants.	:	

ORDER
(Filed June 5, 1992)

Before the court is plaintiffs' *fifth* motion to recuse this judge under Canon 3(E)(1) of the American Bar Association's Code of Judicial Conduct, 28 U.S.C. § 455, and the Fifth Amendment. The grounds alleged for recusal are the same grounds alleged and rejected on the four previous motions for recusal.

DISCUSSION

Title 28 U.S.C. § 455 provides in relevant part:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party. . . .

Canon 3(E)(1) provides that:

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . .
>
> (1) the jury has a personal bias or prejudice concerning a party or a party's lawyer.

The test for recusal under both § 455(a) and Canon 3(e)(1) is "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990). The alleged bias or prejudice must stem from an extrajudicial source. *Jaffree v. Wallace*, 837 F.2d 1461, 1465 (11th Cir. 1988). As this court has previously determined, see Orders of January 17, 1990, January 30, 1990, May 23, 1990, and December 13, 1991, Nix has failed to demonstrate any extrajudicial bias on the part of this judge.[1] Nor has Nix raised any new allegations in his latest motion to recuse this judge. This court does not have, with due respect to Mr. Nix's demands, a duty to reconsider the same allegations over and over again.

Furthermore, this court's rulings in the four previous recusal motions are insufficient to justify recusal. *Jaffe v. Grant*, 793 F.2d 1182, 1189 (11th Cir. 1986), *cert. denied*, 480 U.S. 931 (1987).

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[1] In addition, the Eleventh Circuit has denied Nix's petition for writ of mandamus and prohibition seeking recusal of this judge in the instant action. No. 90-8561 (June 25, 1990).

Finally, the alleged bias or prejudice must be against the party, not against the attorney or attorney-in-fact for the party. See, e.g., *In re Cooper*, 821 F.2d 833, 838-39 (1st Cir. 1987); *United States v. Burt*, 765 F.2d 1364, 1368 (8th Cir. 1985). In rare circumstances, however, the bias against an attorney is so virulent that the judge's impartiality toward that attorney's client may reasonably be questioned. Id. Such is not the case here. This judge reiterates that he harbors no bias or prejudice against Mr. Nix or his clients.

With respect to plaintiffs' Fifth Amendment claim, "it would be anomalous to hold that a claim under [sections 455 and 144] insufficient on its merits could nevertheless satisfy the constitutional standard." *In re IBM Corp.*, 618 F.2d 923, 932 n.11 (2nd Cir. 1980). Therefore, this court's rejection of plaintiffs' claims under section 455 "*a fortiori* defeats [their] due process allegations." Id.

For the reasons set forth above, the court concludes that a reasonable person who knows all the facts would not find that this judge's impartiality might reasonably be questioned. Consequently, plaintiffs' motion to recuse this judge is hereby DENIED.

The court finds that this fifth motion to recuse has risen to the level of harassment. Nix has thirty days to show cause in writing why the court should not impose Rule 11 sanctions.

So ORDERED, this 5th day of June, 1992.

/s/ Wilbur D. Owens, Jr.
WILBUR D. OWENS, JR.,
UNITED STATES DISTRICT JUDGE

CL:lab

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

CURTIS CHEEVES, et al., Plaintiffs,	:	
vs.	:	C.A. 86-43-1-MAC (WDO)
SOUTHERN CLAYS, INC., et al., Defendants.	:	
THEODORE GIBSON, et al., Plaintiffs,	:	C.A. 86-44-2-MAC (WDO)
vs.	:	
SOUTHERN CLAYS, INC., et al., Defendants.	:	

ORDER

(Filed Sept. 14, 1993)

Before the court are four motions for summary judgment. Plaintiffs have filed three motions, including, a cross motion for summary judgment, a motion for summary judgment as to liability for fraud against defendants, and a motion for summary judgment against the Rhode Island Charities Trust as to liability for any judgment entered against defendant Southern Clays, Inc. Defendants have filed one motion renewing an earlier motion for summary judgment. After careful consideration of the arguments of counsel, the relevant case law, and the record as a whole, the court issues the following order.

FACTS

I. Cheeves

On January 30, 1935, a predecessor of defendant Southern Clays, Inc. ("Southern") obtained a mineral lease from Hattie Cheeves and seven of her nine children concerning two hundred acres of property lying in Washington County, Georgia. The lease obtained by Southern required Southern to pay a minimum annual royalty and a per ton royalty on all kaolin removed from the property.

In early 1954, Hattie Cheeves, Mary Cheeves Trawick, and John Cheeves approached Southern about the possible purchase by Southern of the Washington County property. After prospecting the property in August of 1954, Southern entered into negotiations for the purchase of the land. Through its prospecting, Southern had determined that the property might yield four million tons of finished clay. In October 1954, Southern purchased the Washington County property from Hattie Cheeves, several of her children, and several of her grandchildren for $35,000, or $150.00 per acre. In 1963, Southern leased the property to Freeport Sulfur Company for 99 years. Freeport actually mined the Washington County property from 1979 until 1987, recovering only 522,000 finished tons before ceasing operations at the site.

II. Gibson

In 1946, a predecessor to Southern obtained a mineral lease on 130 acres of property located in Wilkinson County, Georgia. The property was jointly owned by Griffin Gibson, Lillian Gibson Francis, and Richard

Shinholster. Only Griffin Gibson and Lillian Gibson Francis actually signed the mineral lease. After the death of Lillian Gibson Francis in 1947, her share of the property passed in equal shares to Griffin Gibson and Richard Shinholster.

In 1962, Southern approached Griffin Gibson about the possible purchase of the Wilkinson County property. Gibson refused to sell the property until after the property had been prospected.[1] In March of 1962, Southern prospected the property. In May and June of 1962, Southern purchased the Wilkinson County property from Griffin Gibson and Richard Shinholster for a total of $40,000, or $307.00 per acre. In 1963, Southern sold its interest in the Wilkinson County property, along with its interest in 29 other properties, to Freeport Sulfur Company for $993,730.00.[2]

In 1985, Robert Lee Watkins, an "investigator," approached plaintiffs about the Washington County and Wilkinson County properties. (Willie Gibson Dep. at 18); (Ethel Wilson Dep. at 30-31.) Watkins told plaintiffs that the prices received by plaintiffs and their predecessors were far lower than the true value of the properties. *Id.* Watkins subsequently obtained permission to sue in

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[1] Both Gibson and Richard Shinholster had previously worked for Southern. In fact, Gibson had at one time worked on a prospecting crew.

[2] As pointed out by defendants, Southern received approximately $33,124.00 per property, or approximately $300.00 per acre, in the sale to Freeport.

plaintiffs' name to obtain relief on the alleged fraudulent sales that took place in 1954 and 1962.[3]

DISCUSSION

On December 17, 1986, this court entered an order in *Gibson v. Southern Clays, Inc.*, Civil Action No. 86-44-2-MAC(WDO), granting defendants' motion for summary judgment as to counts two, three, and five of plaintiffs' complaint. The court granted the motion as to the three counts on the basis that the action was barred by the applicable four-year statute of limitations. The court declined to address defendants' motion for summary judgment as to counts one and four because defendants' motion was premature at that time. Accordingly, the court reserved judgment on whether counts one and four of plaintiffs' complaint were barred by the applicable statute of limitations until the completion of discovery.

On September 22, 1988, this court consolidated the action in *Gibson* with the action in *Cheeves v. Southern Clays, Inc.*, Civil Action No. 86-43-1-MAC(WDO). By reason of this consolidation, the disposition of the claim in *Cheeves* was made subject to the 1986 order entered in *Gibson*. Therefore, since the complaints in both cases present essentially the same causes of actions[4], the court's discussion will concern only counts one and four of the

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[3] One plaintiff, Ethel Wilson, did not enter into an agreement with Watkins and subsequently obtained her own counsel.

[4] The *Cheeves* complaint did present two additional counts: mistake and equitable accounting. These counts are included within the court's discussion.

Gibson complaint, and counts one, four, six and seven of the *Cheeves* complaint.

As noted above, in 1986 the court reserved judgment on whether the four-year statute of limitations barred plaintiffs' claims under counts one and four. Because of the extensive discovery conducted since that order, the court now addresses the question reserved in the 1986 order.[5]

I. Statute of Limitations

The Official Code of Georgia Annotated ("O.C.G.A.") provides two periods of limitation that may be applicable to plaintiffs' cause of action. *See* O.C.G.A. § 9-3-30 (1982) (four-year statute of limitations for trespass or damage to realty); O.C.G.A. § 9-3-31 (1982) (four-year statute of limitations for injuries to personality). Since both sections contain four-year statute of limitations, it is unnecessary to choose from between the two periods.

As noted by the court in 1986, plaintiffs' cause of action in the *Gibson* case accrued in 1962, the date the land transaction took place. Accordingly, plaintiffs' cause of action in the *Cheeves* case is also deemed to have accrued on the date of the land transaction at issue – 1954. Since the actions in *Gibson* and *Cheeves* were not instituted until 1986, plaintiffs' claims are facially barred by the four-year statute of limitations.

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[5] And further, whether the statute of limitations bars counts six and seven of the *Cheeves* complaint.

Plaintiffs maintain, however, that O.C.G.A. § 9-3-96 tolled the applicable statute of limitations until defendants' fraud was discovered in 1985. *See* O.C.G.A. § 9-30-96 (1982). Section 9-3-96 reads:

> If the defendant or those under whom he claims are guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time of the plaintiff's discovery of the fraud.

Id. In order for section 9-3-96 to be applicable, a plaintiff must show:

> (1) *actual fraud* on the part of the defendant involving moral turpitude, (2) which conceals the existence of a cause of action from the plaintiff, and (3) plaintiff's *reasonable diligence* in discovering his cause of action despite his failure to do so within the time of the applicable statute of limitations.

Jim Walter Corp. v. Ward, 245 Ga. 355, 357, 265 S.E. 2d 7, 9 (1980). " 'If facts do exist which would toll the statute of limitations, the [plaintiff] has the burden of setting forth and supporting these facts. . . . ' " *Edmonds v. Bates*, 178 Ga. App. 69, 72, 342 S.E.2d 476, 479 (1986) (quoting *Wade v. Thomasville Orthopedic Clinic*, 167 Ga. App. 278, 281, 306 S.E.2d 366, 368 (1983)).

A. Actual Fraud

To toll the applicable statute of limitations under O.C.G.A. § 9-3-96 and the decision in *Ward*, plaintiffs must first show "actual fraud on the part of the defendant involving moral turpitude. . . . " *Ward*, 245 Ga. at

357. In *McLendon v. Georgia Kaolin Co.*, 782 F.Supp. 1548 (M.D. Ga. 1992), this court held that to establish a prima facie case of fraud, plaintiffs must prove the following elements:

> 1) That defendant made a false representation of a material fact or concealed a material fact when under a duty to disclose;
>
> 2) That defendant knew the representation to be false or omission to be true when he made it;
>
> 3) That defendant made the representation or omission with the intent and purpose of deceiving plaintiff;
>
> 4) That plaintiff relied on the representation or omission;
>
> 5) That plaintiff suffered an injury as a result of such reliance.

McLendon, 782 F. Supp. at 1559; *see also Hubbard v. Stewart*, 651 F. Supp. 294, 298 (M.D. Ga. 1987) *and McLendon v. Galloway*, 216 Ga. 261, 263, 116 S.E. 2d 208, 210 (1960).

Plaintiffs contend that the material facts at issue in this case concern the quantity, quality and commercial value of the kaolin reserves located on the properties in Washington County and Wilkinson County. In plaintiffs' brief in support of their motion for summary judgment as to liability for fraud against defendants, plaintiffs concede that defendants never represented to any plaintiff the quantity, quality or commercial value of the kaolin

reserves. (Pls.' Br. at 14-18, 32-34.)[6] Accordingly, plaintiffs' claim must rest on the concept of fraudulent concealment.

In order to establish a claim of fraudulent concealment, plaintiffs must first prove that defendants "concealed a material fact when under a duty to disclose." *McLendon*, 782 F. Supp. at 1559; *see* O.C.G.A. § 23-2-53 (1982). "The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case." O.C.G.A. § 23-2-53.

Plaintiffs argue that the tenancy-in-common created by the land transactions in 1954 and 1962, and the prior mineral leases, created a confidential relationship between the parties. The question as to whether a tenancy-in-common establishes a confidential relationship was addressed by this court in *McLendon*. In *McLendon*, this court held that although tenants in common "are in a

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[6] Paragraph 39 of plaintiffs' statement of undisputed material facts reads: "[N]ot a single document contains any suggestion, much less competent evidence, that *any* disclosure of quantity, quality and commercial value information was made to *any* of the Cheeves plaintiff-grantors either before or at any time after any of the purchases were consummated." (Pls.' Brief at 17 ¶39.) Further, paragraph 83 states: "[D]efendants have not produced one shred of competent, admissible evidence proving *any* disclosure to either Richard Shinholster or Griffin Gibson of the quantity, quality, and commercial value information. . . . " (Pls.' Brief at 33 ¶83.) These are only two short examples of approximately eight pages in plaintiffs' brief in which plaintiffs state again and again that defendants failed to make any disclosure concerning any of the material facts at issue in this case.

confidential relationship with each other as to the common estate[,] . . . no Georgia case extends this relationship to encompass the circumstance of one tenant purchasing another cotenant's interest." *McLendon*, 782 F. Supp. at 1562. This court noted that the confidential relationship that exists between cotenants deals "only with the situation in which a cotenant purchases an adverse claim to the common estate and then asserts that claim for his own benefit." *Id.* n. 27. Therefore, when a tenant attempts to purchase a fellow cotenant's interest, the parties operate at arms length.[7]

Plaintiffs, however, also maintain that a duty to disclose exists by virtue of the "particular circumstances" of the case. *See* O.C.G.A. § 23-2-53. Because defendants had information as to the quantity, quality and commercial value of the kaolin reserves, and because plaintiffs had no means by which to acquire this information in the absence of extraordinary diligence, plaintiffs contend that defendants were under a duty to reveal this information. Plaintiffs have cited this court to a number of Georgia cases that allegedly support their proposition. *See Holman v. Ruesken*, 246 Ga. 557, 272 S.E. 2d 292 (1980); *Wilhite v. Mays*, 239 Ga. 31, 235 S.E. 2d 532 (1977); *Daugert v. Holland Furnace Co.*, 107 Ga. App. 566, 130 S.E. 2d 763 (1963). In each case, however, it is the *buyer* bringing suit against

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[7] Plaintiffs assert that under O.C.G.A. § 23-2-58, defendants are also in a confidential relationship with plaintiffs because defendants "exercise a controlling influence over the will, conduct, and interest of another. . . . " O.C.G.A. § 23-2-58 (1982). This argument, however, is merely a restatement of plaintiffs contention that as tenants in common a confidential relationship exists between the parties.

the seller for failure to disclose information about the subject matter of the sale, not the seller suing the buyer. The general rule in Georgia is caveat emptor. *See Wilhite*, 239 Ga. at 31. An exception to this rule exists when the *seller* has " 'special knowledge not apparent to the buyer and is aware that the *buyer* is acting under a misapprehension as to facts that would be important to the buyer and would probably affect its decision." *Id.* (emphasis added). No Georgia case has extended this duty to disclose to a buyer with superior knowledge. To transpose the doctrine of passive concealment in this manner would completely alter the relationship of buyers and sellers under Georgia law. In the absence of a confidential relationship, this court will not impose upon the buyer a duty to disclose. Plaintiffs, therefore, have failed to establish a prima facie case for actual fraud.[8]

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[8] Although the failure of plaintiffs to establish a duty to disclose effectively ends the inquiry, plaintiffs have also failed to produce any evidence that they suffered an injury as a result of the alleged fraud. Plaintiffs have produced ample evidence of the value of the leasehold interests that could have been obtained under optimal conditions in 1954 and 1962. Defendants, however, purchased the land on per acreage basis. Plaintiffs have offered absolutely no evidence that the value plaintiffs received on a per acreage basis was unreasonable. Plaintiffs have attempted to use a per ton royalty calculation to determine the reasonable value of the property. Plaintiffs, however, have shown this court no evidence to indicate that a per ton royalty calculation is in any manner related to the determination of a reasonable per acreage value.

B. Reasonable Diligence

Even if the court were to find that the first two elements of section 9-3-96 have been met, plaintiffs have still failed to produce any evidence that they were reasonably diligent in discovering their cause of action. Plaintiffs contend that they were excused from the requirement of "reasonable diligence" by virtue of their confidential relationship with defendants. *See Shipman v. Horizon Corp.*, 245 Ga. 808, 809, 267 S.E. 2d 244, 246 (1980) ("Failure to exercise reasonable diligence to discover the fraud may be excused where a relationship of trust and confidence exists between the parties"). However, as discussed *supra*, no confidential relationship existed between the parties as to the sale of the Gibson and Cheeves properties. The parties operated at arms length. Accordingly, plaintiffs were not excused from the requirement of "reasonable diligence."

Plaintiffs have failed to offer any evidence that they exercised reasonable diligence in discovering the alleged fraudulent sale. In fact, until approached by Robert Lee Watkins in 1985, not one plaintiff inquired in any manner as to quantity, quality, or commercial value of the kaolin reserves.[9] The question as to whether a plaintiff has exercised reasonable diligence is ordinarily one for the jury.

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[9] In the absence of a duty to disclose on the part of defendants, plaintiffs cannot avail themselves of the argument that their lack of knowledge as to the fraudulent nature of the sales tolled the statute of limitations. "Mere ignorance of fraud which, by the use of ordinary diligence, might have been discovered in due time will not suspend the operation of the statute of limitations." *Morris v. Johnstone*, 172 Ga. 598, 606, 158 S.E. 308 (1931).

Jim Walter, 245 Ga. at 357. However, in the absence of any evidence from which a jury could infer reasonable diligence on the part of the plaintiffs, this court finds that the plaintiffs have not met their burden for tolling the statute of limitations.

Therefore, because plaintiffs have failed to establish that the applicable four-year statute of limitations was tolled by O.C.G.A. § 9-3-96, defendants' motion for summary judgment on all claims is **GRANTED**.

II. Motion for Reconsideration

Plaintiffs have also moved this court to reconsider its summary judgment order of December 17, 1986. The court **DENIES** plaintiffs' motion for reconsideration.

CONCLUSION

The court finds that plaintiffs' cause of action was not tolled by O.C.G.A. § 9-3-96. Accordingly, plaintiffs claims are barred by the applicable four-year statute of limitations. Therefore, the motion for summary judgment filed by defendants is **GRANTED** on all claims. Further, plaintiffs' motion that the court reconsider its summary judgment order of December 17, 1986 is **DENIED**.

SO ORDERED, this 14th day of September, 1993.

/s/ Wilbur D. Owens, Jr.
WILBUR D. OWENS, JR.,
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8071

D.C. Docket Nos. CV86-43-1-MAC
CV86-44-2-MAC(WDO)

CURTIS CHEEVES, et al.,

Plaintiffs-Appellants,

versus

SOUTHERN CLAYS, INC., et al.,

Defendants-Appellees.

THEODORE GIBSON, et al.,

Plaintiffs-Appellants,

versus

SOUTHERN CLAYS, INC., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

(October 24, 1994)

Before KRAVITCH and DUBINA, Circuit Judges, and GIBSON* Senior Circuit Judge.

PER CURIAM:

AFFIRMED: *See* 11th Cir. R. 36-1.

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* Honorable Floyd R. Gibson, Senior U. S. Circuit Judge for the Eighth Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8071

CURTIS CHEEVES, et al.,

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THEODORE GIBSON, et al.,

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versus

SOUTHERN CLAYS, INC., et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION(S) FOR REHEARING

(Filed Dec. 16, 1994)

BEFORE: KRAVITCH and DUBINA, CIRCUIT JUDGES, and GIBSON*, Senior Circuit Judge.

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* Honorable Floyd R. Gibson, Senior U. S. Circuit Judge for the Eighth Circuit, sitting by designation.

BEFORE:

PER CURIAM:

The petition(s) for rehearing filed by Appellants is denied.

/s/ Joel F. Dubina
UNITED STATES
CIRCUIT JUDGE